SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

Brief in opp'n to petition not printed

No. 100

THE UNITED STATES OF AMERICA,
Petitioner,

vs.

JIMMIE IRA BROWN,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT, JIMMIE IRA BROWN

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Opinions Below

Opinions of Trial and Appellate Court

The opinion of the Federal District Court for the Western District of Missouri is reported at 67 F. Supp. 116 (R. 22-27). The opinion of the United States Circuit Court of Appeals (R. 31-36) is reported at 160 F. (2d) 310.

Jurisdiction

The judgment of the Circuit Court of Appeals (R. 36) was entered April 4, 1947, and the petition for rehearing (R. 37-40) was denied April 25, 1947 (R. 40). The petition

for writ of certiorari was filed May 23, 1947, and was granted October 13, 1947 (R. 42). The Court's jurisdiction is invoked by petitioner under Section 240a of the Judicial Code, as amended by the Act of February 13, 1925.

Question Presented

On October 26, 1945, respondent, Jimmie Ira Brown, had entered against him, for separate offenses to which he had pleaded guilty, three separate sentences, as follows: (1) a one-year sentence which provided that it was to begin on October 26, 1945; (2) a two-year sentence; and (3) a two-year sentence, the second sentence to begin at the expiration of the first sentence, and the third sentence to begin at the expiration of the second sentence. Shortly thereafter, respondent, while being transported to the Federal penitentiary at Leavenworth, Kansas, and while serving the one-year sentence, attempted to escape custody of the Federal marshal. To this charge of attempted escape he pleaded guilty and was sentenced to a five-year term therefor.

The question presented is whether or not that portion of the Federal Escape Act (18 U. S. C. A. 753h) providing ". . . if such person be under sentence at the time of such offense, the sentence imposed hereunder shall begin upon the expiration of, or upon legal release from, any sentence under which such person is held at the time of such escape or attempt to escape," requires said five-year sentence for attempting to escape to begin no later than the expiration of or legal release from the one-year sentence respondent was held under and serving at the time of the attempt to escape.

Statutes Involved

The Act of May 14, 1930, c. 274, § 9, 46 Stat. 327, as amended by the Act of August 3, 1935, c. 432, 49 Stat. 513 (18 U. S. C. A. 753h), provides:

> Any person committed to the custody of the Attorney General or his authorized representative, or who is confined in any penal or correctional institution pursuant to the direction of the Attorney General, or who is in custody by virtue of any process issued under the laws of the United States by any court, judge, or commissioner, or who is in custody of an officer of the United States pursuant to lawful arrest, who escapes or attempts to escape from such custody or institution, shall be guilty of an offense. If the custody or confinement is by virtue of an arrest on a charge of felony, or conviction of any offense whatsoever, the offense of escaping or attempting to escape therefrom shall constitute a felony and any person convicted thereof shall be punished by imprisonment for not more than five years or by a fine of not more than $4,000, or both; and if the custody or confinement is by virtue of an arrest or charge of or for a misdemeanor, and prior to conviction, the offense of escaping or attempting to escape therefrom shall constitute a misdemeanor and any person convicted thereof shall be punished by imprisonment for not more than one year or by a fine of not more than $1,000, or both. The sentence imposed hereunder shall be in addition to and independent of any sentence imposed in the case in connection with which such person is held in custody at the time of such escape or attempt to escape. *If such person be under sentence at the time of such offense, the sentence imposed hereunder shall begin upon the expiration of, or upon legal release from, any sentence under which such person is held at the time of such escape or attempt to escape.* (Italics supplied.)

The Act of June 29, 1932, c. 310, § 1, 47 Stat. 381 (18 U. S. C. A. 709a), provides:

> The sentence of imprisonment of any person convicted of a crime in a court of the United States shall commence to run from the date on which such person is received at the penitentiary, reformatory, or jail *for service of said sentence: Provided*, That if any such person shall be committed to a jail or other place of detention to await transportation to the place at which his sentence is to be served, the sentence of such person shall commence to run from the date on which he is received at such jail or other place of detention. No sentence shall prescribe any other method of computing the term (June 29, 1932, c. 310, Sec. 1, 47 Stat. 381). (Italics supplied.)

Statement

On October 26, 1945, respondent, Jimmie Ira Brown, having previously pleaded guilty to certain offenses charged, which are set out below, was sentenced under two indictments in the United States District Court for the Western District of Arkansas (R. 13-21). The first indictment was in two counts, Count I charging conspiracy to escape; and Count II charging attempted escape (R. 13-15). The other indictment charged a violation of the National Motor Vehicle Act (R. 19).

Respondent was sentenced under the indictments, as follows:

> Criminal Case No. 840, El Dorado, Arkansas, October 26, 1945:
>
> "One (1) year *from this date* on the second count of the indictment in this cause, and for the period of two (2) years on the first count of the indictment, *to begin* at the expiration of the sentence of imprisonment herein adjudged on the second count; making a total of 3 years imprisonment on the indictment in this case." (Italics supplied.) (R. 16.)

Criminal Case No. 839, El Dorado, Arkansas, October 26, 1945:

"Two (2) years, to begin at the expiration of the sentence of imprisonment adjudged on this day by the court against said defendant on the first count of the indictment in Case No. 840" (R. 20).

Immediately following this, respondent was committed to jail at El Dorado, Arkansas, to await transportation to the Federal penitentiary at Leavenworth, Kansas. On November 8, 1945, respondent, while being transported to this prison, attempted to escape from the custody of the United States marshal for Arkansas. This attempt to escape occurred in the State of Missouri, and an indictment was returned against him, charging a violation of Sec. 753h, Title 18, U. S. C. A. (R. 1). On a plea of guilty to that charge, he was sentenced on January 17, 1946, to the custody of the Attorney General of the United States, for confinement for a period of five years (the maximum number of years provided for under the statute), the term of the sentence ". . . to begin at the expiration of any sentence he is now serving *or to be served* which was *imposed* prior to this date . . ."[1] (R. 3) (italics supplied).

Respondent, in proper time, moved to vacate or correct this five-year sentence imposed upon him by the United States District Court for the Western District of Missouri, contending in his motion that the five-year sentence for attempt to escape should have been made to commence at

[1] "Ordered and adjudged that the defendant, having been found guilty of said offense, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of five (5) years to begin at the expiration of any sentence he is now serving, or to be served which was imposed prior to this date, without costs.

"It is further ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein."

the termination of or expiration of the one-year sentence, that sentence being the first in order of time of the three separate sentences imposed upon him by the United States District Court for the Western District of Arkansas (R. 10-12). The District Court overruled this motion (R. 27). In its memorandum opinion, the trial court held that under the language of the Federal Escape Act, the sentencing court could provide that respondent's sentence for attempting to escape should commence after the expiration of or service of any one or of all of respondent's said three prior sentences.

Respondent, in proper time, appealed from this order to the Circuit Court of Appeals for the Eighth Circuit (R. 29-30), and there renewed his contention that the five-year sentence imposed upon him by the trial court should have been made to commence at the termination of the one-year sentence that he was serving at the time of his attempt to escape (R. 32).

Respondent requested that court to appoint counsel to represent him, and this request was granted (R. 30).

The United States Circuit Court of Appeals for the Eighth Circuit reversed outright the order appealed from, and remanded the cause to the trial court, with directions to correct the five-year sentence imposed for violation of the Federal Escape Act so that it should begin upon expiration of or upon legal release from the sentence under which respondent was serving at the time of his attempted escape, to wit: the one-year sentence imposed by the United States District Court for the Western District of Arkansas (R. 36). In so doing, the court, in its opinion, stated: "The statute seems to be unambiguous, so as to express the intention of Congress . . ." (R. 35).

Petitioner, on April 15, 1947, filed its petition for rehearing (R. 37), and it was denied on April 25, 1947 (R. 40).

Petitioner filed its petition for certiorari on May 23, 1947, and if was granted on October 13, 1947 (R. 42). On that same day, respondent was granted leave to proceed herein in *forma pauperis* (R. 41).

Summary of Argument

The Federal Escape Act provides specifically that a sentence for attempt to escape, as here in question, "shall begin upon the expiration of, or legal release from, any sentence under which such person is held at the time of such escape or attempt to escape." At the time respondent attempted to escape, he was serving one sentence only, and all other sentences imposed upon him were not being served, but were to commence in the future. At the time of the attempt to escape, he was held under the sentence he was then serving, and none other. The intent of Congress as expressed in the Federal Escape Act is that where a person attempts to escape while serving a particular sentence, he is, at the time of such attempt to escape, deemed to be held under that sentence only, and not under other sentences previously imposed but which by their terms are to commence in the future. That this is the intent of Congress is supported by the applicable decisions and the unanimous opinion of the lower court. This is a penal statute, and it is to be strictly construed in favor of the liberty of the citizen. The sentence, if made to commence at the termination of the one-year sentence being served at the time of attempting to escape, satisfies all requirements of the Federal Escape Act, and is in addition to, and independent of, any other previously imposed sentences, within the meaning of the Federal Escape Act. In view of the clearly expressed intent of Congress in the Federal Escape Act, this Court is, in effect, being requested to "legislate" through judicial construction to arrive at a result contrary to the clearly

expressed intent of Congress. If experience now calls for such a change in the Federal Escape Act, the appropriate request therefor should be made to Congress.

ARGUMENT

I

The Federal Escape Act provides specifically the time any sentence thereunder must commence, and this provision completely supports the judgment of the Appellate Court and the position of respondent.

The Federal Escape Act provides specifically the time a sentence thereunder, such as the one in question, must commence. The applicable words are: "The sentence . . . shall begin upon the expiration of, or legal release from, any *sentence under which such person is held at the time of such escape or attempt to escape*" (Italics supplied).

At the time respondent attempted to escape, he was actually serving the one-year sentence imposed upon him by the United States District Court for the Western District of Arkansas. That sentence by its terms provided that it should be for a term of "one year *from this date*" [October 26, 1945]. (Italics supplied.)

Further, Sec. 709a, Title 18, U.S.C.A., provides among other things, that:

> "The sentence of imprisonment of any person convicted of a crime in a court of the United States shall commence to run from the date on which such person is received at the penitentiary, reformatory, or jail *for service of said sentence: Provided,* That if any such person shall be committed to a jail or other place of detention to await transportation to the place at which his sentence is to be served, the sentence of such person shall commence to run from the date on which

he is received at such jail or other place of detention. No sentence shall prescribe any other method of computing the term" (Italics supplied).

As noted in the statement of facts, respondent was, immediately following the imposition of his one-year sentence, committed to the jail at El Dorado, Arkansas, to await transportation to the Federal prison at Leavenworth, Kansas, so that it conclusively appears both from the terms of that sentence and from the statute set out immediately above, that from the date of the imposition of that first sentence for a one-year term, he was held in custody under and serving that sentence, and none other, at the time he attempted to escape, on November 8, 1945.

All of the other sentences imposed against respondent, by their very terms were not to commence until after the service of or legal expiration of those prior in time, and the five-year sentence for attempting to escape was not to begin until after the expiration of or service of the prior imposed sentences.

That being the fact, beyond dispute, the question is, was respondent being held under any other sentence at the time of his attempt to escape?

Respondent, at the time of his attempt to escape, was serving only one sentence, and his other sentences were to commence only after that sentence ended. He could not at that time, under such circumstances, be deemed to be held under any *sentence* which was to *commence* in the distant future. When he was actually serving a sentence, as is the case here with regard to the one-year sentence, he was held under that sentence. He was not at that time held under any other sentence.

Petitioner's argument is unsound, in that petitioner claims that because there were three sentences (although each is entirely separate from the others), and because each

sentence was to commence as soon as the preceding one ended, respondent was being held under all three sentences *at the time he attempted to escape.* Petitioner, in effect, attempts to construe three separate sentences as one continuous sentence. In so doing, petitioner has overlooked the fact that the Federal Escape Act specifically provides one rule to be applied where a person attempts to escape from lawful custody before conviction, and an entirely different rule that is to be applied if he is serving a sentence at the time of the attempted escape. In the former case, *Congress has provided* that the sentence for the attempted escape may be concurrent with any sentence previously imposed for any other crime. *Rutledge* v. *U. S.*, 146 F. 2d 199. In the latter case, however, *Congress has provided* that the sentence must be consecutive to and must begin upon termination of or expiration of the sentence under which he is held at the time of the attempt to escape. Respondent, in fact, at the time of his attempt to escape, was being held under the sentence he was serving, and as soon as that sentence ended, he could, and, of course, then for the first time would be held under the next sentence, if, meanwhile, it was not voided or changed. At the termination of the first sentence, there would be a technical change of sentence and custody, even though it might be that, as a practical matter, respondent would not enjoy any personal freedom between these separate sentences. The fact that sentences are cumulative does not and should not permit petitioner to treat them as one sentence.

Petitioner in its brief attempts to, at least in effect, rewrite the Federal Escape Act so as to make it read in its application: "The sentence imposed hereunder shall begin upon the expiration of the *aggregate* of all sentences previously imposed against the convicted person." Had Congress actually intended this, it would have said so clearly, just as it specifically did in the Federal statute governing

good-conduct commutations, wherein Congress used the words, "aggregate of his several sentences" (18 U.S.C.A. § 710). Note also the case of *Anderhold* v. *Hudson*, 84 F. 2d 559, wherein the court distinguishes the words and meaning of the Federal Escape Act from those of the Good-conduct Commutation Act, and specifically refutes any theory of aggregation of time applying so as to include sentences under the Federal Escape Act. Petitioner in its brief mentions the statute governing good-conduct commutations and also one concerning paroles. It is extremely noteworthy that in both of those statutes Congress had no difficulty in selecting words such as "the aggregate of his several sentences" and similar phrasing that clearly and beyond any doubt indicated the intention of Congress therein. In the Federal Escape Act, Congress could have used and would have used words such as those indicated above, instead of using words with exactly the contrary meaning, if Congress had intended the result contended for by petitioner. Whenever consecutive sentences were treated in the aggregate for any particular purpose, the statute involved specifically provided for such treatment.

Petitioner, through argument, having attempted to add the word "aggregate" to the Federal Escape Act, would then remove the words "under which such person is held at the time of such . . . attempt to escape," and insert in lieu thereof words of this import: "which have been made (imposed) prior to the attempted escape." When Congress used the word "*held*" in a highly penal criminal statute, it intended that such word be construed strictly, and as a word of art, and not otherwise.

One can escape only from legal custody. Legal custody requisite for escape from being held under a sentence exists only when the custodian has the right *under the particular sentence* to the possession of the prisoner. There was only one sentence, to-wit, the one-year sentence im-

posed in Case No. 840, under which the right to such legal custody existed at the time of the attempted escape. Respondent was not actually restrained of his liberty by virtue of any sentence but that one. Had respondent sought a writ of habeas corpus by virtue of any alleged defect in any of the sentences imposed upon him, other than the one year sentence, he would have been denied the writ for the reason that he was not yet actually held in custody by virtue of such sentences or restrained of his liberty by virtue of them, and thus would have been premature in seeking that relief. *McMahan* v. *Hunter*, 150 F. 2d, 498, and cases cited therein.

Petitioner in its brief focuses attention on the word "any", as appears in the Federal Escape Statute, and argues that it means any and all sentences which may have been *imposed*. Although a sentence may be imposed, it does not necessarily follow that at the particular time in question a person is *held* under it. If held at all, he may be held under some other sentence or some other lawful restraint. A sentence may be imposed to commence in the future. Further, the word "any" is susceptible of many meanings and shades of meanings. It has often been held to mean "any and all." It has just as often been held to mean "any" in the sense of one. When used in a statute it is restricted in its meaning to the context of the statute, and this is particularly true when it is used in a criminal statute. *United States* v. *Wiel*, 46 F. Supp. 323, 326.

The Federal Escape Statute contains the words "any sentence" and not "any sentences", and further limits its provisions by the words "under which such person is held at the time of such escape or attempt to escape." The reason for the use of the word "any" in the statute is understandable. The person may be *serving* two sentences concurrently, as, for example, a sentence for one year and also a sentence for two years' imprisonment. Since that person would simultaneously and concurrently be *serving*

both sentences, the word "any" becomes necessary. Otherwise it would not be clear whether the sentence for the unlawful attempt to escape should begin at the end of the one year sentence or at the end of the two year sentence that is being *concurrently served*. And, obviously, since the person would be serving both sentences concurrently, he would be deemed to be *held* under both sentences. To remove any possible confusion Congress worded the language of the Federal Escape Act so as to require the sentence for the attempt to escape to begin *after any sentence under which the person is actually held in custody at the time he escapes or attempts to escape that custody*. This example is readily distinguishable from the instant case, because respondent was not serving concurrent sentences at the time he attempted to escape. At that particular time he was held under the only sentence he was then serving, and none other.

II

Respondent's sentence if made to commence at the termination of the previously imposed one year sentence, would satisfy the requirements of the Federal Escape Act that the sentence be in addition to and independent of certain previously imposed sentences.

Respondent's sentence if made to commence at the termination of the previously imposed one year sentence, would satisfy the requirements of the Federal Escape Act that the sentence be in addition to and independent of certain previously imposed sentences. In *Rutledge* v. *United States*, 140 F. 2d 199, the Circuit Court of Appeals for the Fifth Circuit stated that a sentence meets the requirement of being in addition to, and independent of, other sentences where such sentence was a separate sentence under a separate indictment. As there pointed out, such a sentence is in all

respects a complete sentence within itself. Had any other sentence previously imposed been voided, this sentence would not have been vitiated or otherwise affected thereby. Further, the mere fact that the respective sentences were to begin at the same time would not alter the fact that the sentence for attempted escape was separately and additionally imposed and that it was wholly independent of the others.

As stated in the case of *Rutledge* v. *United States, supra,* in approaching the meaning of Congress in this statute the judiciary must apply the established rule that criminal statutes must be construed favorably to the liberty of the citizen. There was no intent on the part of Congress, according to the case of *Rutledge* v. *United States, supra,* in requiring a separate sentence in the Federal Escape Act to eliminate any possibility of the sentence for the unlawful attempt to escape to run concurrently with other sentences that had been imposed.

III

All applicable authority leads inescapably to the conclusion that the sentence in question must commence at the expiration of, or legal release from, the sentence respondent was serving at the time of the attempted escape.

Although the question presented herein is in a sense one of first impression, the principle of law directly involved has been intentionally and advisedly declared in the case of *Thomas* v. *Hunter* (C. C. A. 10, 1946), 153 F. 2d 834. The facts there presented were that, on October 16, 1941, while Thomas was out on parole from a sentence previously imposed, he was arrested, and on November 13, 1941 was indicted for having violated the Dyer Act. On November 21, 1941 and again on November 8, 1942 he attempted to escape. Thomas pleaded guilty to the Dyer Act charge and

was sentenced to four years' imprisonment. He was given a trial on the two escape charges, and on being found guilty thereof was sentenced to five years' imprisonment on each of the two charges. The two sentences for violating the Federal Escape Act, and the Dyer Act sentence were to run consecutively, for a total of fourteen years' imprisonment and were to begin after the Dyer Act sentence had been served. Thomas argued that the two sentences for violating the Federal Escape Act were void because they had to commence at once and not upon the expiration of, or legal release from, the Dyer Act sentence. He reasoned that he was being held under the sentence for which he was out on parole at the time he attempted escape, and thus the sentences for the unlawful attempted escapes should begin when that sentence ended. The Court ruled that Thomas was not being *held under any sentence* at the times he attempted to escape because at such times he was out on parole from his previous sentence, and that, therefore, the court could make the two sentences for the attempted escape concurrent with any of his sentences, or could make such sentences consecutive to any such sentence, as it did. The court impliedly ruled that if it had been found, as a matter of law, that Thomas was being held *under a particular sentence* at the times of the attempted escapes, any sentences for the attempted escapes must begin after such sentence under which he was held at the times of the attempted escapes had expired or terminated. The court said (l. c. 837):

> "In Zerbst *v.* Kinwell, 304 U. S. 359, 59 S. Ct. 872, 8 L. Ed. 1299, 116 A. L. R. 808, the Supreme Court held that where one who was on parole or probation committed another offense for which he was arrested and sentenced, while he was incarcerated under the latter sentence he was imprisoned only thereunder, and the service of the original sentence was interrupted and

the running of such sentence began again only at the completion of the new sentence. It was held that during the time he was serving the new sentence he was no longer in either actual or constructive custody under the first sentence. From this it follows that when appellant was arrested for the Dyer Act violation, the original sentence was interrupted and suspended. The original being suspended, he was not under that sentence when he broke jail. Petitioner not having been under the original sentence at the time he broke jail, it follows that when the court passed the sentences for the jail break, the provision of the statute which he seeks to invoke did not apply to him.

Furthermore, we think the proviso upon which petitioner relies means that where one is confined and actually serving a prior sentence when he escapes from custody, then the sentence for such escape must be fixed with relation to the expiration date of the prior sentence or with reference to the date on which one is thereafter legally released from confinement thereunder. It has no application where one is out on parole when he escapes from custody. The words of the statute are: 'The sentence imposed hereunder shall begin on expiration of, *or upon legal release from*, any sentence *under which such person is held at the time of such escape*. * * *' If petitioner's construction of the statutory proviso were correct, then the phrases 'or upon legal release' and 'under which such person is held at the time of such escape' would be meaningless and would be mere surplusage. If one is out on parole he is not held under the sentence."

Thus, by the very language of the *Thomas* case, "during the time he was serving the new sentence he was no longer either in actual or constructive custody under the first sentence." Applying that principle to the present case, obviously respondent at the time he attempted to escape was then serving the one-year sentence only and was not in either actual or constructive custody under any other

sentence. The court construes the Federal Escape Statute provisions so as to require one to be held in either actual or constructive custody under a sentence and does not concern itself with the question of whether or not a sentence has been *imposed*. The court ruled that the provision of the Federal Escape Statute which petitioner seeks to invoke does not apply unless at the time the person attempts to escape he is being held in custody under the sentence or sentences in question. It held that if one is out on parole at the time he attempts to escape, he is not held in custody under the sentence even though the sentence has been imposed against him and even though his parole may be later revoked so that at some future date he may have to complete serving that sentence.

In *Rutledge* v. *United States*, 146 F. 2d 199, the Court restates that portion of the Federal Escape Act in which we are interested (18 U. S. C. A., Sec. 753(h)) as follows:

> "It further provides that if a person is under sentence at the time of the offense, the sentence imposed for the escape shall begin at the expiration of or legal release *from the sentence being served.*" (Italics supplied.)

The court's ruling refutes petitioner's contention that this escape sentence must follow the aggregate of all sentences imposed previous to the sentence for the wrongful escape or attempt to escape, and holds that it can be concurrent therewith, as he was not at the time he attempted to escape then under any sentence, but only under arrest and in custody.

In *McMahan* v. *Hunter*, 150 F. 2d 498, the facts were that McMahan previously had been convicted of a violation of the Dyer Act and sentenced to serve three years therefor. Thereafter, he was convicted on two separate escape charges and sentenced to two years' imprisonment on each

charge under the Federal Escape Act. All sentences were to be consecutive for a total of seven years' imprisonment. McMahan sought a writ of *habeas corpus.* The court refused the writ as to the two escape sentences, saying (l. c. 500):

> "* * * we must therefore (acknowledge) assume that he is now in the custody of the respondent by virtue of the Oklahoma sentence and will be until February 3, 1946 * * *." (The writ is refused because) "petitioner was not *actually restrained of his liberty by virtue of them,* but was in lawful custody of the respondent by force of a valid judgment of the Oklahoma court. The writ may not be used as a means of securing the determination of a judicial question, which if determined in petitioner's favor, will not result in his immediate release." (Italics supplied.)

Respondent submits that this can only mean that where one is actually restrained of his liberty or is in lawful custody only under one sentence which he is then actually serving, he is not deemed to be held under any sentence which by its own terms is to commence in the future. Since respondent was actually serving a sentence at the time he attempted to escape, and all other sentences involved were to commence in the future, he was held only under the sentence that he was serving at the time that he made the attempt to escape.

In *Lyons* v. *Squire,* 54 F. Supp. 557, an erroneous attempt was made to have a sentence imposed for wrongful escape run concurrently with another sentence which the defendant had yet to complete serving because he had forfeited his deduction for time off for good behavior. The court stressed the point that the sentence under the Federal Escape Act is a separate and independent sentence, and by the terms of the Act itself could not be served concurrently

with the latter part of the sentence he was actually serving at the time he escaped. As the court there said (l. c. 559):

> "To hold otherwise would be * * * to nullify the provisions of the Act that require an independent sentence to be served only upon the expiration of the *sentence from which such prisoner made an escape.*" (Italics supplied.)

The above case is not mentioned in petitioner's brief. Respondent submits that the language quoted has the meaning that a sentence which one is actually serving and actually in confinement under is the one under which he is held. Otherwise it could not be the "sentence from which such prisoner made an escape." To relate this to the Federal Escape Act the respondent contends that where one is actually serving a sentence at the time he attempts to escape, and serving no other, the word "held" as used therein means held under that particular sentence and none other.

The case of *Gambill* v. *Aderhold*, 4 F. Supp. 567, concerns the language of the Federal Escape Act as originally enacted in May, 1930. In that decision the Court specifically ruled that a person will be received at a penitentiary for service of a sentence for wrongful escape only after he has served the original sentence from which he attempted to escape. It recognizes that unless a prisoner is under concurrent sentences he can be deemed to be serving only one of them at the particular time of the attempted escape.

Thus all of the authority which appears helpful leads to the conclusion that the five-year sentence for violation of the Federal Escape Act must begin at the expiration of or legal release from the one-year sentence which respondent was actually serving at the time of his attempt to escape.

Much of petitioner's argument is directed to a situation other than the one now before this Court and which is in

fact far different from it. Petitioner, for argument's sake, assumes a fictional situation where a sentence has been imposed but the defendant has not yet begun serving the sentence. It is difficult to imagine how as a practical matter this fictional situation might arise in view of the actual practice of the Courts to either make the sentence commence at once (as was done in this case) or to commit the person to jail to await transportation to a penal institution so as to come within the terms of 18 U. S. C. A., Sec. 709(a), set out *supra* in this brief. However, even if such situation did ever arise, respondent asserts that the provisions of the present Federal Escape Act would make such attempt to escape a crime within the meaning of that Act and that the punishment provided therein would then be applicable. The Federal Escape Act in effect covers four different situations, to-wit:

(1) Any person who has been committed to the custody of the Attorney General or his authorized representative;

(2) Or who is confined in any penal or correctional institution pursuant to the direction of the Attorney General;

(3) Or who is in custody by virtue of any process issued under the laws of the United States by any court, judge or commissioner;

(4) Or who is in custody of an officer of the United States pursuant to lawful arrest.

Since petitioner's fictional example is different from the situation now before this Court, respondent does not believe it appropriate to enter into argument upon a moot question that does not bear directly upon his own situation. Suffice it to say that in the fictional example given by petitioner the act of the person attempting to escape would be in violation of the terms of the Federal Escape Act and it would then be up to the Court to determine whether or not such

person at the time of the attempt to escape was being held under some order of the Court or under lawful arrest or possibly under the sentence which had been imposed. Respondent doubts that a court would find that such person was being held under the sentence that had been imposed but had not commenced. However that would depend upon the precise factual situation before the court and involve the question of whether or not the petitioner at such exact time might not be held in custody under the lawful arrest or some other order. Obviously prior to the actual imposition of the sentence the person would be held in lawful custody by virtue of some process or order and he would probably continue to be held in custody under that process or order until the actual commencement of his sentence (or until he came within the terms of 18 U. S. C. A., Sec. 709 (a), which is tantamount to the commencement of the serving of the sentence).

IV

This Court is in effect being requested to legislate so as to secure a result contrary to the present statutory provision contained in the Federal Escape Act, and Congress is the appropriate place for such request.

Prior to the enactment of the original Federal Escape Act on May 14, 1930 (c. 274, § 9, 46 Stat. 327) it was not a crime against the United States to escape from or to attempt to escape from a penal institution or while serving a Federal criminal sentence. No matter how desirable it may have seemed to Federal enforcement officers to have a person punished by a penal sentence for escaping or attempting to escape, Congress had not made it a Federal offense and it could not be dealt with as such. And this, because there are no common law criminal offenses against the United States. This Court has always upheld that fundamental constitutional principle. As originally enacted

on May 14, 1930, the Federal Escape Statute was considerably limited in scope and dealt only with escapes or attempts to escape by persons who had been convicted of some offense and were under sentence at the time of the escape or attempt to escape.[2] Obviously at that time and until August 3, 1935 the wording of this relatively new statute did not apply to a person being lawfully held in actual custody but who prior to the imposition of a sentence escaped or attempted to escape from such custody. Again, enforcement officers may have felt strongly that such conduct should be subject to punishment by a similar sentence. However, Congress had not provided that such conduct could be punished, and no resort was made to any court to "legislate" to bridge what enforcement officials felt was a "gap" or omission in the statute. Instead, and properly, on August 3, 1935 (c. 432, 49 Stat. 513) Congress was requested to and did amend the Federal Escape Act to cover this "gap" which experience under the Act had proved to enforcement officials needed to be covered, and who in turn convinced Congress of the desirability of covering the omission.

Further, the Federal Escape Act, as now written, has a specific provision which states exactly when, under the situation now before this Court, a sentence for the crime of attempting to escape shall commence. Congress has spoken on that precise subject. If experience under the Federal

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[2] Sec. 9. Any person properly committed to the custody of the Attorney General or his authorized representative or who is confined in any penal or correctional institution, pursuant to the direction of the Attorney General, who escapes or attempts to escape therefrom shall be guilty of an offense and upon apprehension and conviction of any such offense in any United States court shall be punished by imprisonment for not more than five years, such sentence to begin upon the expiration of or upon legal release from the sentence for which said person was originally confined.

Escape Act as now written by Congress leads enforcement officials to the conclusion that trial judges should have authority to make sentences for attempt to escape commence at the end of the aggregate of all sentences that may have been imposed against a person prior to the attempt to escape, then the result of that experience should be placed before Congress with the request that the statute be appropriately amended. Instead, the argument is now advanced that because such result now seems desirable to petitioner this Court should in effect read that result out of the specific provisions of the Federal Escape Act, the very words of which provide the contrary. As succinctly stated in *Viereck* v. *United States*, 318 U. S. 236, by Chief Justice Stone speaking for this Court: "The unambiguous words of a statute which imposes criminal punishment are not to be altered by judicial construction so as to punish one not otherwise within its reach, however deserving of punishment his conduct may seem."

This Court has always construed penal statutes strictly in favor of the accused; *Rutledge* v. *United States*, 146 Fed. (2d) 199; *Viereck* v. *United States, supra; Smith* v. *United States*, 145 F. 2d 643 (Cert. Den. 323 U. S. 803). In the latter case, *Smith* v. *United States*, the case of *Holmes* v. *United States*, 267 Fed. 529, was approved. The *Holmes* case is authority for the long recognized principle that a criminal statute must be definite and certain in respect to the punishment it is intended to impose. As said therein, l. c. 531: "It is undoubtedly the law that a valid criminal statute should be certain in its terms, and not leave uncertain the acts intended to be prohibited or the punishment to be inflicted thereunder. The punishment in the event of conviction must be as certain as any other provision of the statute. 16 C. J., 68."

Conclusion

For the reasons and authorities heretofore mentioned, it is respectfully submitted that the unanimous judgment of the Eighth Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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(3892)

SUPREME COURT OF THE UNITED STATES

No. 100.—October Term, 1947.

The United States of America, Petitioner, v. Jimmie Ira Brown.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

[February 2, 1948.]

Mr. Justice Rutledge delivered the opinion of the Court.

The Federal Escape Act requires that a sentence for escape or attempt to escape "shall begin upon the expiration of, or upon legal release from, any sentence under which such person is held at the time of" the escape or attempt.[1] The narrow question is whether the Act re-

[1] The Act is as follows: "Any person committed to the custody of the Attorney General or his authorized representative, or who is confined in any penal or correctional institution pursuant to the direction of the Attorney General, or who is in custody by virtue of any process issued under the laws of the United States by any court, judge, or commissioner, or who is in custody of an officer of the United States pursuant to lawful arrest, who escapes or attempts to escape from such custody or institution, shall be guilty of an offense. If the custody or confinement is by virtue of an arrest on a charge of felony, or conviction of any offense whatsoever, the offense of escaping or attempting to escape therefrom shall constitute a felony and any person convicted thereof shall be punished by imprisonment for not more than five years or by a fine of not more than $5,000, or both; and if the custody or confinement is by virtue of an arrest or charge of or for a misdemeanor, and prior to conviction, the offense of escaping or attempting to escape therefrom shall constitute a misdemeanor and any person convicted thereof shall be punished by imprisonment for not more than one year or by a fine of not more than $1,000, or both. The sentence imposed hereunder shall be in addition to and independent of any sentence imposed in the case in connection with which such person is held in custody at the time of such escape or attempt to escape. If such person be under sentence at the time of such offense, the sentence imposed hereunder shall begin upon the expiration of, or upon legal release from, any sentence under which such person is held at the time of such escape or attempt to escape." 49 Stat. 513, 18 U. S. C. § 753h.

quires that a sentence for attempt to escape shall begin upon the expiration of the particular sentence being served when the attempt occurs or at the expiration of the aggregate term of consecutive sentences then in effect, of which the one being served is the first.

The facts are these. Respondent was charged under two indictments in the District Court for the Western District of Arkansas. One contained two counts, the first charging conspiracy to escape, the second attempt to escape. The other indictment was for violation of the National Motor Vehicle Theft Act. 41 Stat. 324, 59 Stat. 536. Respondent pleaded guilty to all three charges. On October 26, 1945, he was sentenced as follows: under the first indictment charging the escape offenses, imprisonment for one year on the second count, and for two years on the first count, the sentences to run consecutively in that order; under the motor vehicle theft indictment, imprisonment for two years, to run consecutively to the other two. Thus the aggregate of the three consecutive sentences was five years.

On November 2, 1945, respondent was serving the one-year term of the first sentence as ordered by the court. On that date he was being transported in custody of a United States marshal from an Arkansas jail to Leavenworth Penitentiary in Kansas.[2] During the journey's progress through Missouri he attempted to escape. This resulted in another indictment, in the Western District of Missouri, to which also respondent pleaded guilty. The District Court sentenced him to imprisonment for five years, the term "to begin at the expiration of any sentence he is now serving, or to be served which was imposed prior to this date . . . ."

[2] The sentence began to run as of the time respondent was committed to jail to await transportation to the Leavenworth penitentiary. 47 Stat. 381, 18 U. S. C. § 709a.

Respondent filed a motion to correct this last sentence. He contended that at the time of the last attempt he was being "held," within the meaning of the last sentence of the Federal Escape Act, only under the one-year sentence pronounced in the Western District of Arkansas, and that the Act required the five-year sentence under the indictment returned in Missouri to commence at the expiration of that one-year term.

The District Court overruled the motion. It held that under the statute the sentencing court could order that the sentence begin to run after the service of any one or all of respondent's three prior sentences. 67 F. Supp. 116. The Circuit Court of Appeals, however, reversed the judgment. Relying on the canon of strict construction of criminal statutes, it equated the statutory word "held" to "serving," and concluded that a sentence for escape or attempt to escape must begin at the expiration of the particular sentence which the prisoner is serving at the time the escape or attempt occurs. Accordingly the court remanded the cause to the District Court with directions to correct the five-year sentence so that it would begin upon expiration of or legal release from the one-year sentence. 160 F. 2d 310. We granted certiorari because of the importance of the question in the administration of the Federal Escape Act.

Although prison breach or other escape by prisoners from custody was a crime under the common law,[3] there was no federal statute proscribing such conduct prior to the enactment of the original Federal Escape Act in 1930, 46 Stat. 327. That Act dealt only with escape or attempted escape while under sentence. It was enacted as part of a program sponsored by the Attorney General for the reorganization and improved administration of the federal penal system. H. R. Rep. No. 106, 71st Cong., 2d

[3] Miller, Criminal Law 463–465.

Sess. The Act took its present form in 1935, when it was broadened at the Attorney General's request [4] to cover escape while in custody on a federal charge prior to conviction.[5]

The legislation reflects an unmistakable intention to provide punishment for escape or attempted escape to be superimposed upon the punishment meted out for previous offenses. This appears from the face of the statute itself. It first provides that persons escaping or attempting to escape while in custody, whether before or after conviction, shall be guilty of an offense. Then follow provisions for determining whether the offense shall be a felony or a misdemeanor, with corresponding prescriptions of penalties.

At this point the statute had no need to go further if the intention had been merely to leave to the court's discretion whether the penalties, within the limits prescribed, should run concurrently or consecutively in accordance with the generally prevailing practice. On that assumption the statute was complete, without addition of the last two sentences. But in that form the Act would have left the court with discretion to make the sentence run concurrently or consecutively with the other sentences previously in effect or put into effect in the case or cases pending when the escape occurred.

Precisely to avoid this more was added, in the explicit provisions that "the sentence imposed hereunder *shall be*

[4] H. R. Rep. No. 803, 74th Cong., 1st Sess.; S. Rep. No. 1021, 74th Cong., 1st Sess.

[5] The Government's brief aptly summarizes some of the more serious considerations leading to adoption of the original and amended acts, as follows: "Escapes and attempted escapes from penal institutions or from official custody present a most serious problem of penal discipline. They are often violent, menacing, as in the instant case, the lives of guards and custodians, and carry in their wake other crimes attendant upon procuring money, weapons and transportation and upon resisting recapture."

in addition to and independent of any sentence imposed in the case in connection with which such person is held in custody at the time of such escape or attempt to escape. If such person be under sentence at the time of such offense, the sentence imposed hereunder *shall begin upon the expiration of, or upon legal release from, any* sentence under which such person is held at the time of such escape or attempt to escape." (Emphasis added.)

These sentences foreclosed, and were intended to foreclose, what the earlier portions of the Act had left open, namely, the court's power to make the escape sentence run concurrently with the other sentences.[6] Whether the escape was before or after conviction, additional punishment was made mandatory, in the one case by the explicit requirement, "in addition to and independent of" any sentence imposed; in the other by the command that the escape sentence "shall begin upon the expiration of, or upon legal release from, any sentence," etc. The differing verbal formulations were necessary to meet the different "before" and "after" conviction situations. But the two provisions had one and the same purpose, to require additional punishment for the escape offense. The idea of allowing the escape sentences to run concurrently with the other sentences was completely inconsistent with this common and primary object, as well as with the wording of the two concluding clauses. In many cases such concurrent sentences would nullify the statutory purpose altogether; in others, they would do so partially.[7]

Moreover, imposition of such additional punishment had been the prime object, indeed the only one, of the original Escape Act, which was applicable only to escapes

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[6] But see *Rutledge* v. *United States*, 146 F. 2d 199.

[7] Depending on whether the term of the sentence for escape, as of the time of its imposition, is shorter or longer than the periods of the other sentences remaining unserved.

after conviction. It made such escapes or attempts "offenses," punishable by imprisonment for not more than five years, "such sentence to begin upon the expiration of or upon legal release from the sentence for which said person was originally confined."[8] This provision, though differing from the wording of the last sentence of the present Act had the same prime object. Concurrent sentences were as inconsistent with its terms as with those of the present Act, for in many cases like this one they would have added no further punishment in fact.

Congress, it is true, did not cast the original Act in terms specifically relating to a situation comprehending consecutive sentences existing at the time of the escape or attempt, as more careful drafting of the Act would have required to insure achieving the object of adding independent punishment in all cases. Its concentration upon that main aspect of the legislation apparently led it to reduced emphasis upon and care in the definition of the situations to which the Act would apply.

Nevertheless in view of the Act's broad purpose, it would be difficult to conclude that the original phrasing, "the sentence for which said person was originally confined," was intended to apply only to the sentence, one of several consecutive ones, which the prisoner happened to be serving when the escape or the attempt occurred, or that the Act would be effective only where the prisoner was serving time under a single sentence, which was per-

[8] The Act was as follows: "Any person properly committed to the custody of the Attorney General or his authorized representative or who is confined in any penal or correctional institution, pursuant to the direction of the Attorney General, who escapes or attempts to escape therefrom shall be guilty of an offense and upon apprehension and conviction of any such offense in any United States court shall be punished by imprisonment for not more than five years, such sentence to begin upon the expiration of or upon legal release from the sentence for which said person was originally confined." 46 Stat. 327.

haps the more common of the situations which Congress had in mind. The same basic reasons which require rejection of either of those views of the present Act would apply to the original one.

But, in any event, Congress changed the wording of the "after expiration or release" clause in the original statute when enacting the amended one. "The sentence for which said person was originally confined" became "any sentence under which such person is held at the time of such escape or attempt to escape." This change is not without significance. For use of the words "*any* sentence under which such person is *held*" means something more than the narrowest possible construction of "*the* sentence for which said person *was originally confined*," unless the change is to be taken as meaningless. We think it was intended, as were the other amendments made at the same time, to broaden the Act's coverage or to assure its broad coverage,[9] and therefore to include situations where the prisoner was being "held" under more than one sentence. Otherwise there would be no reason for or meaning in the change.

We think therefore that the Act contemplates "additional" and "independent" punishment in both the concluding clauses in a practical sense, not merely in the technical sense of concurrent sentences having no effect to confine the prisoner for any additional time. In a very practical sense, a person in custody under several consecutive sentences is being "held" under the combined sentences. And the legislative language is a natural, though not nicely precise, way of stating the purpose that the sentence for escape shall begin upon the expiration of the aggregate of the terms of imprisonment imposed by earlier sentences. Granted that the present problem could have

[9] Either by eliminating the original wording's ambiguity by rejecting the narrow construction or, if that construction were thought valid, by changing the Act's terms to insure a different result.

been obviated by even more astute draftsmanship, the statute on its face and taken in its entirety sufficiently expresses the congressional mandate that the sentence for escape is to be superimposed upon all prior sentences.

We are mindful of the maxim that penal statutes are to be strictly construed. And we would not hesitate, present any compelling reason, to apply it and accept the restricted interpretation. But no such reason is to be found here. The canon in favor of strict construction is not an inexorable command to override common sense and evident statutory purpose. It does not require magnified emphasis upon a single ambiguous word in order to give it a meaning contradictory to the fair import of the whole remaining language. As was said in *United States* v. *Gaskin*, 320 U. S. 527, 530, the canon "does not require distortion or nullification of the evident meaning and purpose of the legislation." Nor does it demand that a statute be given the "narrowest meaning"; it is satisfied if the words are given their fair meaning in accord with the manifest intent of the lawmakers. *United States* v. *Raynor*, 302 U. S. 540, 552; *United States* v. *Giles*, 300 U. S. 41, 48; *Gooch* v. *United States*, 297 U. S. 124, 128; *United States* v. *Corbett*, 215 U. S. 233, 242.

To accept the decision of the Circuit Court of Appeals would lead to bizarre results. The congressional purpose would be frustrated, in part at least, in every situation where an escape is effected or attempted during the prisoner's service of any but the last of two or more consecutive sentences, possibly even in that instance. Barring intervention of executive clemency, it would be completely nullified in all cases where the consecutive sentences which the prisoner has not yet begun to serve aggregate five years or more. In the latter situation the prisoner could attempt any number of jail breaks with impunity. A court would be powerless to impose added confinement for violation of the Escape Act.

The holding of the Circuit Court of Appeals thus places it beyond the power of the judge to superimpose additional imprisonment for escape in those instances where such punishment is most glaringly needed as a deterrent.[10] There is also this further striking incongruity. The judge is completely interdicted from imposing an additional sentence for escape or attempt to escape, the one type of offense which Congress unmistakably intended to be subject to separate and added punishment, although he may direct that a sentence for any other federal offense shall begin at the expiration of consecutive sentences theretofore imposed.

No rule of construction necessitates our acceptance of an interpretation resulting in patently absurd consequences. And the absence of any significant legislative history, other than has been related, may be indicative that Congress considered that there was no such problem as is now sought to be injected in the statutory wording or that by the 1935 amendment it had cured the previously existing one. The liberty of the individual must be scrupulously protected. But the safeguards of cherished rights are not to be found in the doctrinaire application of the tenet of strict construction. Neither an ordered system of liberty nor the proper administration of justice would be served by blind nullification of the congressional intent clearly reflected in the Federal Escape Act.

The judgment of the Circuit Court of Appeals is

Reversed.

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS dissent.

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[10] The $5,000 fine that could be imposed for each escape attempt, see note 1 *supra*, would be no deterrent to an impecunious offender, and little more than an empty threat to the long-incarcerated one whose all-consuming interest is freedom.